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IN THE

# Supreme Court of the United States

OCTOBER TERM 1953

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES
*Petitioner*

v.

WESTINGHOUSE ELECTRIC CORPORATION

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

The Company, in its brief in opposition to the Petition for a Writ of Certiorari herein, urges two grounds for denial of the petition. One of those grounds is that the conflict between the circuits, relied on by the Union, does not in fact exist. We need not respond to that argument at length. In all of the cases which we cited as being in conflict with the decision below, the courts of appeals *did* hold that Section 301 of the Taft-Hartley Act gave the federal courts jurisdiction over a suit by a union based on collective bargaining contract provisions providing for benefits to employees. In this case, the court below held that there is no such federal jurisdiction. It recognized the conflict (R.121). The cases themselves disclose it.

We do desire to reply briefly to the other argument made by the Company: that the petition requests an advisory opinion because the Union's claim that the Company violated the collective bargaining contract is "wholly without merit and even frivolous (Opp., p. 9)." The

Company argues that this Court should not decide the serious jurisdictional question presented by the petition because there is no substantial dispute as to the merits. It asserts that the court below was of the opinion that the Union's substantive claim was without merit and that "the National Labor Relations Board and the eight Federal Judges who have reviewed the case have all agreed "that it was without merit." (Opp., p. 6).

These statements are simply not so. The National Labor Relations Board has never decided the contractual issue here involved, and the majority of the Court of Appeals did *not* decide or even suggest that petitioner's claim of violation of the contract is without merit. Their jurisdictional decision was *not* an added afterthought to a decision on the merits. To the contrary, the majority opinion of the Court of Appeals assumes throughout that there is merit in the petitioner's claim under the contract.[1] (R. 118). Three judges, who disagreed on the jurisdictional issue, did say that they thought the petitioner's substantive claim was without merit. (R. 129-130.) But they did not file a concurring opinion, they filed a dissent. (R. 124).

The argument that our claim of contract violation is "frivolous", is a new one. The Company did not so argue below—it did not tell the Court of Appeals not to

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[1] This was so stated in the Petition for Certiorari, at p. 4. The Company apparently rests its argument to the contrary wholly on a misinterpretation of our petition. We stated, in a paragraph which plainly discussed only the opinoin of the dissenting judges, that "*they* did indicate their agreement with the trial court as to the inadequacy of the facts stated in the Complaint" (Petition, p. 6, emphasis added). The Company, by neatly replacing a pronoun which we meant to refer to three minority judges with the words "the majority of the Circuit Judges" apparently seeks to persuade this Court that the majority judges actually did agree with the trial court. (Opposition, p. 8)

We do not defend our choice of language. Perhaps the words used in our petition might lead a person unfamiliar with the proceedings to the misinterpretation which the Company makes. But a reading of the opinions below should leave no doubt either as to the actual decision of the Court of Appeals or as to the intention of our language.

concern itself with the jurisdictional issue, because the cause of action was frivolous. To the contrary, it raised the jurisdictional question. It argued it vigorously. And it won. It persuaded the Appellate court to hold that there was no federal jurisdiction. Having won on this ground, and on this ground alone, the Company now says, for the first time, that the case should have been disposed of solely on the merits. It argues here that the jurisdictional question which *was* decided by the court below should not be reviewed because the issue on the merits, which was *not* decided, is obviously to be resolved in its favor. The statement of the position is, we think, argument enough against it.

**The Merits**

We did not present, as a question to be decided by this Court the question of contract construction which is involved on the merits. We refrained from doing so because the Court of Appeals did not decide that question and because we doubt that it presents a federal issue of such general importance as to warrant review in this Court. We asked only that this Court reverse the judgment of the Court of Appeals on the jurisdictional issue so that we could get what we have not yet had from the Court of Appeals—a decision on the merits.

We still believe that our action was correct. But the respondent's assertion that our claim on the merits is frivolous is, perhaps, sufficient reason to sketch very briefly the nature of the contractual controversy.

The union here is an independent union of *salaried* employees. It does not represent any employees who are paid by the hour. The employees whom it represents are distinguished from the employees of the Company who are represented by other unions by the fact that they are paid on a salary basis, and not on an hourly basis.

The collective bargaining contract conforms with this

basic characteristic of the unit. It provides for the payment of monthly salaries. (R. 13-16). It does not provide for hourly payments, and it does not provide for deductions from monthly salaries for either voluntary or involuntary absences of short duration. It does contain, however, specific provisions as to hours to be worked, both on a daily and a weekly basis and it also contains detailed provisions expressly permitting certain types of absences such as vacations, holidays, negotiating time, etc.

The contractual issue presented by these provisions is whether the absence of an employee, of a type not specifically covered by the contract, gives the Company the right to deduct an hourly equivalent from his monthly salary payments, just as if he were paid by the hour, or whether, on the other hand, the Company's right under the collective bargaining agreement is to require the employees to make up the lost time.

This problem is not dealt within the contract as a pay problem at all, but as a problem to be dealt with under the "Hours of Work" provision. In that section of the contract (R. 20-21) it is provided that "different methods of attendance control are employed throughout the Company. The method used is determined by local situations and is designed to control local problems and is a subject for local collective bargaining." (R. 21).

In amplification of this general provision, the Union annexed to its complaint a copy of a portion of the Company's Industrial Relations and Accounting Manuals (Part 6). These Manuals are referred to in the contract itself as containing "instructions or interpretations of this Agreement" and are required to be furnished to the Union (R. 19).

The material annexed to the complaint clearly shows that it was the Company's interpretation of the contract that "salary for the basic work week (less furlough time if any) shall be paid whether or not all voluntary absence

has been made up." (Sub. Ex. A to Exhibit F to the Complaint, following R. 96.) It further shows, by specific instruction and by example, that a case of voluntary absence of a full day should be dealt with, under the contract, not by making a deduction from salary for the absent hours but only by requiring that make-up hours worked be paid for at straight time.

Thus, the instruction states that "unless there is voluntary absence to be made up, hours worked on Saturday shall be paid at one and one-half (1½) rate and hours worked on Sunday shall be paid at double rate." Example No. 1 shows an employee who was voluntarily absent (Symbol "A") for 8 hours on Monday and .3 of an hour on Tuesday. The same employee was required to work 10 hours on Saturday and Sunday, and 8.3 of the hours so worked were not counted as premium hours but, rather, as make-up hours.

The matter of overtime requires perhaps an additional comment. Despite the fact that the employees here involved are paid on a salary basis, overtime is computed on an hourly basis. This does not make them hourly paid employees. It arises because the Fair Labor Standards Act requires that employees subject to the Act be paid for weekly overtime on an hourly basis. Hence, the collective bargaining contract provides for time and one-half for all overtime for salaried employees who are not exempt from the Act. Altogether different provisions are applicable to employees who are exempt from the Act and the provisions of the Accounting and Industrial Relations Manual with reference to attendance and payroll, attached to the complaint as Exhibit F (R. 81-96) do not, in general, apply to such employees.

It is only in connection with the computation of overtime that any distinction between voluntary and involuntary absences is made in the contract. The contract specifically provides that involuntary absences are to be

considered as time worked for the purpose of determining overtime. No mention is made of voluntary absences, but the clear intendment is that such absences are not to be considered as time worked for overtime purposes, and the accounting instructions (Sub-Exhibit A, following R. 96) carry out this purpose.

In sum, the contract provides for the payment of monthly salaries, not for payment by the hour. It provides for the normal hours of work and says that attendance control is a matter to be governed by procedures outside of the formal contract. It distinguishes between voluntary and involuntary absences, but only for the purpose of calculating overtime, which, under the statute, must be done on an hourly basis. Finally, the Company's own manual shows that the Company construed the contract as requiring that "salary . . . shall be paid whether or not all voluntary absence has been made up."

The District Court (and the three dissenting judges below) erred in their construction of the contract because they misconceived the basic question. They asked whether the contract specifically required the Company to pay for hours voluntarily not worked; they should have asked whether the contract specifically authorized deductions for hours voluntarily not worked from the salaries which it did require to be paid. They noted the careful definition of involuntary absences and presumed that this meant that voluntary absences were to be the occasion for deductions from salaries; they should have noted that the distinction was drawn for purposes of overtime computation only, and that, so used, the distinction was entirely consistent with plaintiff's theory. They ignored entirely the impact of the Company's manual, not as an independent covenant, but as an accepted and long standing interpretation of the contract. Finally, they disposed of the issue on the bare complaint, without an opportunity for trial or full exploration of the issues and

thus violated the familiar principles that on a motion to dismiss the complaint must be construed in the light most favorable to the plaintiff and that, under Rule 12(b), a complaint should not be dismissed unless it appears to a certainty that no cause of action would exist on any state of the facts which could be proved in support of the claim. (See cases cited in Federal Digest, Vol. 31C, pp. 513-520.)

**Conclusion**

The respondent here is playing fast and loose with the Court. It succeeded in avoiding an appellate decision on the merits by persuading a majority of the Court of Appeals to dispose of the case solely on a jurisdictional issue. Now it seeks to persuade this Court not to review the jurisdictional issue because the case should have been decided in the Company's favor below on the merits. It asks this Court to deny certiorari on an important issue, as to which there is a square conflict between the circuits, by making a summary decision as to the merits of a claim not adjudicated by the Court of Appeals.

Such an argument ought not to be permitted even if the Court agreed with its premise: that the Union's substantive claim is wholly without merit. But our brief sketch of the Union's argument on the merits is sufficient, we believe, to show that the premise is false and that there is a genuine and substantial controversy on the merits.

Respectfully submitted,

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